

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CITIBANK SOUTH DAKOTA NA,)	DIVISION ONE
)	
Respondent,)	No. 63409-7-I
)	
v.)	
)	UNPUBLISHED OPINION
ANDREW D. MACHLEID,)	
)	
Appellant.)	FILED: February 8, 2010
_____)	

Dwyer, J. — Andrew Machleid appeals from an order granting summary judgment in favor of Citibank South Dakota NA, which had sued Machleid to collect an outstanding debt. We affirm.

I

In June 2004, Machleid applied for a Citibank credit account to obtain Citibank's promotional rate of zero percent interest for 12 months on balance transfers. Machleid transferred the balances of two credit cards, together totaling \$8,000, into his Citibank account. Upon establishing his account in June 2004, Machleid received an initial card agreement, which contained a provision allowing Citibank to unilaterally amend the card agreement. Citibank sent

Machleid monthly billing statements, each of which indicated that it concerned Machleid's "Citi Platinum Select Card" account. Machleid was sent an amended card agreement as an attachment to his September 2004 billing statement.

For almost a year, Machleid made monthly minimum payments on the account. However, in June 2005, Machleid did not make a payment. As a result of this default, the interest rate charged on the outstanding balance increased from the promotional interest rate of zero percent to an annual percentage rate ranging, over the next two years, from 29.99 percent to 32.24 percent. By September 2007, due to numerous late fees and finance charges, Machleid's account was outstanding for \$13,169.81.

Citibank sued Machleid seeking to collect the debt. Citibank then moved for summary judgment. In support of its summary judgment motion, Citibank provided: (1) an affidavit from Leola Phenix, an attorney management specialist for Citicorp Credit Services, which is Citigroup's servicing company; (2) all of Machleid's billing statements from June 2004 through September 2007; and (3) a copy of Citibank's amended card agreement. Neither the initial card agreement in effect in June 2004 nor Machleid's credit card application was submitted to the trial court. Machleid responded with a cross-motion to dismiss or for summary judgment. Machleid submitted his own declaration, in which he stated that he had noticed in June 2005 that his interest rate had changed, that he then "contacted Citibank and told them this was an error," and that he

“repeatedly communicated [with Citibank,] . . . including a letter I sent to Citibank.” The trial court denied both parties’ motions without prejudice.

In February 2009, Citibank moved for summary judgment a second time, submitting an affidavit from Shauna Houghton, a different Citicorp Credit Services employee. The trial court granted summary judgment to Citibank, reserving the issue of an award of attorney fees. When Citibank later moved for such an award, Machleid responded that attorney fees should not be awarded both because the amended card agreement was inadmissible given that it was not the original contract and because Houghton’s declaration was inadmissible given that it contained hearsay. This was the first time that Machleid raised these evidentiary challenges in the trial court.

Machleid timely appealed from the trial court’s order granting summary judgment in favor of Citibank, but he did not appeal from the court’s order awarding attorney fees to Citibank.

II

We review de novo a trial court’s order granting summary judgment. Estate of Haselwood v. Bremerton Ice Arena, Inc., 166 Wn.2d 489, 497, 210 P.3d 308 (2009). Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). In

determining whether a genuine issue of material fact exists, we “must view all facts and reasonable inferences in the light most favorable to the nonmoving party.” VersusLaw, Inc. v. Stoel Rives, LLP, 127 Wn. App. 309, 320, 111 P.3d 866 (2005) (citing City of Lakewood v. Pierce County, 144 Wn.2d 118, 125, 30 P.3d 446 (2001)).

III

Machleid contends that summary judgment was improperly granted because a genuine issue of material fact exists as to whether Machleid agreed to the terms of Citibank’s amended card agreement. We disagree.

To establish a breach of contract, the plaintiff must show that a valid contract between the parties existed. Myers v. Dep’t of Social & Health Servs., 152 Wn. App. 823, 827-28, 218 P.3d 241 (2009). In order for a valid contract to be formed, there must be an objective manifestation of mutual assent. Keystone Land & Dev. Co. v. Xerox Corp., 152 Wn.2d 171, 177, 94 P.3d 945 (2004). Whether mutual assent occurred is normally a question of fact. Discover Bank v. Ray, 139 Wn. App. 723, 726, 162 P.3d 1131 (2007). “But this determination of fact may be determined as a matter of law where reasonable minds could not differ.” Ray, 139 Wn. App. at 726.

The offeror is the master of the offer and may propose acceptance by conduct. M.A. Mortenson Co. v. Timberline Software Corp., 140 Wn.2d 568, 590, 998 P.2d 305 (2000). The terms may then be accepted by performing

those acts proposed by the offeror. Ray, 139 Wn. App. at 727. In Ray, the court held that Ray accepted the terms of Discover Bank's credit card agreement by virtue of his conduct because the agreement clearly provided that use of the credit card constituted acceptance of the agreement's terms and Ray had used the credit card for several years. 139 Wn. App. at 727.

Machleid asserts that Citibank did not prove the terms of their contract because it did not provide the court with a signed copy of the original contract.¹ But Citibank is not required to provide the initial agreement or the application that Machleid signed. Rather, Citibank must show only that Machleid was bound by the terms of the amended card agreement (which was submitted as evidence) because he assented to that agreement. Citibank met its burden by proving (1) that when Machleid first obtained his credit account he received a card agreement, which allowed Citibank to unilaterally amend the contract; (2) that, in September 2004, Machleid received the amended card agreement, which states that the card holder accepts the terms if he or she does not object in writing within 25 days; and (3) that Machleid did not object in writing to the terms of the amended agreement. There is no dispute as to these facts. Thus, Citibank

¹ Machleid asserts that he applied for a balance transfer account rather than for a Citibank credit card account. But the fact that Machleid used his account to transfer the debt balance of his previously-held credit cards rather than using his account to directly purchase products with a credit card is of no legal significance. There is no meaningful distinction between an extension of credit for balance transfers and an extension of credit to purchase goods by using the credit card assigned to the account. This is because "balance transfer" is not a noun. Rather, "balance" is a noun and "transfer" is a verb. Machleid applied for a Citibank credit card account and then transferred the balance of his debt from two of his other credit cards into his Citibank account. His attempt to avoid his payment obligation by recasting the account as a "balance transfer" account is unavailing.

established that Machleid accepted the terms of the amended agreement, which was in effect when he defaulted on his payments.

IV

Machleid also argues that Citibank's amended card agreement is not enforceable because it violates Washington's statute of frauds by not complying with the writing requirements of either RCW 19.36.010 or RCW 19.36.110. We disagree.

RCW 19.36.010 requires, among other things, that any agreement, contract, or promise "that by its terms is not to be performed in one year from the making thereof" or that is a "special promise to answer for the debt, default, or misdoings of another person" be in writing and signed by the party to be charged, or else the agreement is void. RCW 19.36.110 provides that:

A credit agreement^[2] is not enforceable against the creditor unless the agreement is in writing and signed by the creditor. . . . Partial performance of a credit agreement does not remove the agreement from the operation of this section.

Machleid first contends that the card agreement is void without his signature because it is a "promise to answer for the debt, default, or misdoings of another person." RCW 19.36.010. However, this provision of the statute is

² "Credit agreement" means an agreement, promise, or commitment to lend money, to otherwise extend credit, to forbear with respect to the repayment of any debt or the exercise of any remedy, to modify or amend the terms under which the creditor has lent money or otherwise extended credit, to release any guarantor or cosigner, or to make any other financial accommodation pertaining to a debt or other extension of credit.

inapplicable to the agreement between Machleid and Citibank because Machleid was agreeing to answer for his own personal debt, not for the debt of another.

Machleid also contends that RCW 19.36.110 requires the credit agreement between Citibank and Machleid be written and signed. However, credit card agreements and extensions of credit for personal, family, or household purposes are explicitly exempted from any signature requirements by RCW 19.36.120, which provides that:

RCW 19.36.100 through 19.36.140 and 19.36.900 shall not apply to: (1) A promise, agreement, undertaking, document, or commitment relating to a credit card or charge card; or (2) a loan of money or extension of credit to a natural person that is primarily for personal, family, or household purposes and not primarily for investment, business, agricultural, or commercial purposes.

Machleid asserts that RCW 19.36.120 does not apply to his agreement with Citibank because Citibank has not shown that he obtained either a credit card or a credit account for “personal use.” However, the record—particularly the billing statements—reveals that Machleid had a credit card account. RCW 19.36.120 exempts both agreements for a credit card and agreements to extend credit for personal use. Therefore, Citibank was not required to prove that Machleid used the extension of credit for personal use. The agreement between Citibank and Machleid is enforceable without a signature pursuant to RCW 19.36.120.

V

Machleid next contends that summary judgment was improperly granted

because a genuine issue of material fact exists as to whether Citibank's card agreement violated the Truth in Lending Act (TILA).³ We disagree.

Where the moving party has met its burden pursuant to CR 56, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts. . . . [T]he nonmoving party must come forward with 'specific facts showing that there is a *genuine issue for trial*.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d. 538 (1986) (quoting FRCP 56(e)). A party's self-serving statements of conclusions and opinions alone are insufficient to defeat a summary judgment motion. Segaline v. Dep't of Labor & Indus., 144 Wn. App. 312, 325, 182 P.3d 480 (2008) (citing Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 359-61, 753 P.2d 517 (1988)).

Machleid provided no evidence that Citibank's card agreement or card application violated TILA beyond his bare assertion that "we are unsure whether the credit card application . . . was compliant with TILA" in the absence of a copy of the original credit card application. Such a bare assertion of a potential issue, unsupported by a factual basis, is insufficient to defeat summary judgment.

VI

³ TILA requires certain disclosures to be made in a particular form within solicitations and applications for credit cards. 15 U.S.C. § 1637(c); 12 C.F.R. § 226.5. A creditor must retain proof of compliance with TILA's disclosure provisions for two years after the date the disclosures are required to be made. 12 C.F.R. § 226.25. In an action by the creditor to collect amounts owed by the debtor, the debtor can assert the creditor's violation of TILA as a defense or a counterclaim in order to offset the amount owed by the debtor to the creditor. 15 U.S.C. § 1640(h).

Machleid next contends that a genuine issue of material fact exists as to whether he had validly notified Citibank of an error in his billing statement. No such factual issue exists.

A creditor must comply with specific statutory requirements when a debtor provides the creditor with written notice of a potential billing error within 60 days of the billing statement being sent. 15 U.S.C. § 1666(a).⁴ To trigger the

⁴ 15 U.S.C. § 1666(a) provides:

If a creditor, within sixty days after having transmitted to an obligor a statement of the obligor's account in connection with an extension of consumer credit, receives at the address disclosed under section 1637(b)(10) of this title a written notice (other than notice on a payment stub or other payment medium supplied by the creditor if the creditor so stipulates with the disclosure required under section 1637(a)(7) of this title) from the obligor in which the obligor—

- (1) sets forth or otherwise enables the creditor to identify the name and account number (if any) of the obligor,
- (2) indicates the obligor's belief that the statement contains a billing error and the amount of such billing error, and
- (3) sets forth the reasons for the obligor's belief (to the extent applicable) that the statement contains a billing error,

the creditor shall, unless the obligor has, after giving such written notice and before the expiration of the time limits herein specified, agreed that the statement was correct—

(A) not later than thirty days after the receipt of the notice, send a written acknowledgment thereof to the obligor, unless the action required in subparagraph (B) is taken within such thirty-day period, and

(B) not later than two complete billing cycles of the creditor (in no event later than ninety days) after the receipt of the notice and prior to taking any action to collect the amount, or any part thereof, indicated by the obligor under paragraph (2) either—

- (i) make appropriate corrections in the account of the obligor, including the crediting of any finance charges on amounts erroneously billed, and transmit to the obligor a notification of such corrections and the creditor's explanation of any change in the amount indicated by the obligor under paragraph (2) and, if any such change is made and the obligor so requests, copies of documentary evidence of the obligor's indebtedness; or
- (ii) send a written explanation or clarification to the obligor, after having conducted an investigation, setting forth to the extent applicable the reasons why the creditor believes the account of the obligor was correctly shown in the statement and, upon request of the obligor, provide copies of documentary evidence of the obligor's indebtedness. In the case of a billing error where the obligor alleges that the creditor's billing statement reflects goods not delivered to the obligor or his designee in accordance

creditor's obligations, the debtor's written notice must identify the debtor's name, the account number, the fact that the debtor believes there is a billing error, the amount of the alleged billing error, and the reasons the debtor believes that there is a billing error.⁵ 15 U.S.C. § 1666(a). If the creditor does not comply with the requirements of 15 U.S.C. § 1666, the creditor forfeits any right to collect from the debtor the amount of the billing error, up to \$50. 15 U.S.C. § 1666(e).

"[C]onclusory statements of fact will not suffice" to defeat summary judgment. Grimwood, 110 Wn.2d at 360. While Machleid declared that he had sent a letter to Citibank, no evidence of which was contained in Citibank's records, such an assertion is insufficient to create a genuine issue of material fact regarding whether Citibank violated 15 U.S.C. § 1666(a). Even viewing the evidence in the light most favorable to Machleid, the evidence does not demonstrate that Machleid's letter to Citibank met the statutory requirements of 15 U.S.C. § 1666(a), such as that the letter was sent within the required time frame or included the necessary information regarding the purported billing error. Machleid's conclusory statement of fact is insufficient to establish the existence of a disputed question of material fact.

with the agreement made at the time of the transaction, a creditor may not construe such amount to be correctly shown unless he determines that such goods were actually delivered, mailed, or otherwise sent to the obligor and provides the obligor with a statement of such determination.

After complying with the provisions of this subsection with respect to an alleged billing error, a creditor has no further responsibility under this section if the obligor continues to make substantially the same allegation with respect to such error.

⁵ Citibank's amended card agreement contains similar requirements for the debtor to report billing errors.

VII

Machleid next challenges the admissibility of the amended card agreement based on ER 1002 and the admissibility of Houghton's declaration as containing inadmissible hearsay. However, Machleid did not raise these evidentiary challenges prior to the trial court's grant of summary judgment to Citibank. Instead, after summary judgment was granted, Machleid raised these evidentiary issues in his response to Citibank's motion for an award of attorney fees, an order from which Machleid did not appeal.

All evidentiary objections must be timely and specific. ER 103. Pursuant to the rule regulating review of summary judgment proceedings, "the appellate court will consider only evidence and *issues* called to the attention of the trial court." RAP 9.12 (emphasis added). "It is our duty to review evidentiary rulings made by the trial court; we do not ourselves make evidentiary rulings." Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC, 139 Wn. App. 743, 756, 162 P.3d 1153 (2007). Because Machleid did not make a timely objection to the admissibility of the amended card agreement or to Houghton's declaration, we will not consider these issues on appeal. State v. Davis, 141 Wn.2d 798, 850 n.287, 10 P.3d 977 (2000); State v. Guloy, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985).

Machleid also objects to Phenix's declaration as containing inadmissible hearsay. Citibank does not argue that Phenix's declaration is admissible. But

“[e]rror in the admission of evidence is without prejudice when the same facts are established by other evidence.” Feldmiller v. Olson, 75 Wn.2d 322, 325, 450 P.2d 816 (1969). Houghton’s unchallenged declaration provided substantially the same evidence as Phenix’s declaration.⁶ There is no basis for appellate relief.

VIII

Machleid next argues that a genuine issue of material fact exists as to the sum of his debt because the interest rate charged by Citibank is subject to state usury laws. Again, we disagree.

State usury laws are preempted by federal laws regarding interest rates charged on loans by national banks. Marquette Nat’l Bank of Minneapolis v. First of Omaha Serv. Corp., 439 U.S. 299, 313-19, 99 S. Ct. 540, 58 L. Ed. 2d 534 (1978). The National Bank Act (NBA), 12 U.S.C. §§ 21 *et seq.*, permits a national bank to charge any interest rate allowed by the state where the bank is located, provided that the state has fixed some interest rate. 12 U.S.C. § 85.⁷ For a national bank to utilize the state interest rate provision of 12 U.S.C. § 85, the state need not have established a specific maximum interest rate amount.

⁶ In addition, we did not consider Phenix’s declaration in determining whether there was any genuine issue of material fact that would make summary judgment improper.

⁷ 12 U.S.C. § 85 provides, in relevant part:

Any association may take, receive, reserve, and charge on any loan . . . interest at the rate allowed by the laws of the State, Territory, or District where the bank is located When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater.

Rather, the state has fixed an interest rate for NBA purposes if state law allows creditors to charge any interest rate that the parties agree to in writing. Daggs v. Phoenix Nat'l Bank, 177 U.S. 549, 555, 20 S. Ct. 732, 44 L. Ed. 882 (1900); Wolverton v. Exchange Nat'l Bank of Spokane, 11 Wash. 94, 97, 39 P. 247 (1895).

Citibank is a national bank located in South Dakota and, therefore, the NBA applies to Citibank's activities. Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 737-38, 116 S. Ct. 1730, 135 L. Ed. 2d. 25 (1996). The maximum interest rate South Dakota law allows is that interest rate to which the parties agree in writing. South Dakota Codified Law 54-3-1.1. The amended card agreement governs the relationship between Citibank and Machleid, and contains the interest rates to which the parties agreed. Because the interest rates actually charged by Citibank against its loan to Machleid were within the maximum interest rate permitted by the card agreement, the interest rates were authorized by South Dakota law and, thus, were not usurious.

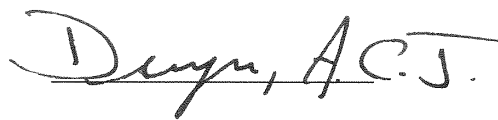
IX

Citibank requests that we award it attorney fees on appeal. We may award attorney fees on appeal if (1) applicable law grants a party the right to recover reasonable attorney fees on review and (2) the party devotes a section of its opening brief to the request for fees. RAP 18.1. We should deny a party's attorney fee request where the party devotes to the issue only one sentence in

its brief's concluding paragraph. Wilson Court Ltd. P'ship v. Tony Maroni's, Inc., 134 Wn.2d 692, 710 n.4, 952 P.2d 590 (1998); Whidbey Gen. Hosp. v. Dep't of Revenue, 143 Wn. App. 620, 637, 180 P.3d 796 (2008); In re Marriage of Taddeo-Smith & Smith, 127 Wn. App. 400, 407, 110 P.3d 1192 (2005); Johnson v. Cash Store, 116 Wn. App. 833, 850-51, 68 P.3d 1099 (2003). In addition, "[a]rgument and citation to authority are required" to advise the court of the appropriate ground for an award of attorney fees; the parties must make "more than a bald request for attorney fees." Wilson Court Ltd. P'ship, 134 Wn.2d at 710 n.4.

Citibank fails to devote a section of its brief to a request for an award of attorney fees, merely requesting attorney fees in the last sentence of its brief's concluding paragraph, and also fails to provide any authority for the request beyond a citation to RAP 18.1. Citibank's request does not meet the mandatory requirements of RAP 18.1(b). Therefore, Citibank, although the prevailing party, is not entitled to an award of attorney fees on appeal.

Affirmed.

A handwritten signature in black ink, appearing to read "Dwyer, A.C.J.", with a horizontal line underneath the name.

We concur:

Schindler, CT Edington, J